United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

Docket No. 75-7237

IN THE
United States Court of Appeals
For the Second Circuit

EUGENIA E. CARVER,

Plaintiff,

—*v.*—

CARL F. GUY,

Defendant and Third Party Plaintiff,

—*v.*—

CHRISTOPHER S. CARVER,

Third Party Defendant.

On Appeal from the United States District Court
Northern District of New York

APPELLANT'S BRIEF & JOINT APPENDIX

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STATEMENT OF ISSUE PRESENTED FOR REVIEW:

Whether the Federal District Court's Order granting summary judgment and thereby dismissing Appellant's Third Party Complaint was proper.

STATEMENT OF THE CASE

On or about the 5th day of November, 1971, Mrs. Eugenia E. Carver, Christopher S. Carver, the son of the aforementioned Eugenia E. Carver, and Carl F. Guy, Esq. entered into an agreement for the purpose of terminating a trust created for Eugenia E. Carver and of which her son, Christopher , was a donee. Mr. Guy had acted as legal counsel to Mrs. Carver in the past and was chosen by her to obtain the funds that had been placed in a trust for her.

The vehicle chosen for the termination of the trust was an escrow agreement. The funds were to be transferred to Christopher Carver, as donee of the trust, and then through the Escrow Agreement to Mrs. Carver, with Carl Guy acting as the Escrow Agent.

Carl Guy was successful in terminating the trust and it was at this point that a conflict began to arise between the parties to the escrow agreement. Christopher Carver made known to Carl Guy his displeasure over the fee arrangement, which had been orally agreed to by the parties and which allowed Carl Guy to take from the escrow account, his fee, and which was based on a percentage of the trust proceeds. Finally, Mrs. Carver, hereinafter referred to as the Plaintiff, brought an action in U.S. District Court, Northern District of New York, to recover the monies Mr. Guy had taken out of

the escrow account as previously agreed to. Plaintiff then moved for summary judgment on her claim which motion was unsuccessful and this matter is presently before the Onondaga County Bar Association Fee Dispute Panel.

The present appeal by Mr. Guy, hereinafter referred to as the Third Party Plaintiff, centers around paragraph #5 of the escrow agreement and reads as follows, "The Donor and Nominee do hereby release the Escrow Agent from and agree to indemnify him against any liability whatsoever arising out of this agreement."

Following the commencement of the action by the Plaintiff for the recovery of the monies taken as attorney's fees, the Third Party Plaintiff moved against Christopher Carver, hereinafter referred to as the Third Party Defendant, for indemnification by him in the action commenced by the Plaintiff. This third party action was based on the indemnification clause in the escrow contract as agreed to by the parties to these proceedings. It is the contention of the Third Party Plaintiff that the indemnification clause requires the Third Party Defendant to indemnify him in the amount of the claim by the Plaintiff.

The Third Party Defendant, by his attorneys, then moved for summary judgment, seeking to dismiss the Third Party Action for indemnification. This motion was heard before the Hon. Edward Port, U.S. District Judge, on March 11, 1975,

and on that date an Order was made granting the Third Party Defendant's motion for summary judgment and dismissing the action of the Third Party Plaintiff. No opinion was given by the District Court.

The Third Party Plaintiff is now appealling the Order of the District Court and he believes that the Third Party Defendant's motion for summary judgment should not have been granted and that the Order made by the Hon. Edward Port on March 11, 1975, granting summary judgment, should now be reversed.

AGRUMENT:

POINT I.

THE THIRD PARTY PLAINTIFF'S INTERPRETATION OF THE INDEMNIFICATION CLAUSE IS REASONABLE AND SHOULD HAVE BEEN FOLLOWED BY THE DISTRICT COURT IN RULING ON THE THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Third Party Plaintiff has stated in his answering affidavit in opposition to the motion for summary judgment that the indemnification clause was clearly designed to protect the escrow agent from the other parties to the agreement, as well as others and is not limited in any way. It is the contention of the Third Party Defendant that the escrow agreement was designed solely for the purpose of protecting the escrow agent from possible suits by third parties. However, the indemnification clause, as agreed to, contains no such limitation.

In construing indemnification agreements, the Courts of New York have adopted a policy of strict construction and will not disregard clear and unequivocal wording of the contract and "engraft" an exception to indemnification agreement. Kurek v. Port Chester Housing 18 N.Y.2 450, 457 (1966), See also Redding v. Gulf Oil Corp., 38 AD2 850 (1972).

In a more recent decision by the New York Court of Appeals, it was stated that if a party to an indemnification

clause "had reservations as to the scope of the agreement, he should have insisted on a different indemnification clause or refused to give his assent to the contract." Levine v. Shell Oil Co. 28 N.Y.2 205, 213 (1971). See also Ciofalo v. Vic Tanney Gyms 10 N.Y.2 294 (1962).

Thus, if the Third Party Defendant had reservations or doubts as to the scope of the indemnification clause or if he desired a more restrictive agreement, he should have suggested such a change before signing the agreement. He cannot now be allowed to modify or change its meaning by the use of parol evidence as to what his intentions were at the time the contract was signed. Loch Sheldrake Association v. Evans 306 N.Y. 297 (1953) and Aratari v. Chrysler Corp. 35 A.D.2 1077 (1971).

Finally, in ruling on a motion for summary judgment the facts as presented by the opponent of the motion will be controlling, and the material presented by the moving party will be viewed in the light most favorable to the opposing party. First National Bank of Cincinatti v. Pepper 454 F2 626,629 (1972) USCA, Second Circuit. It was also stated by the Court in First National Bank of Cincinatti v. Pepper, supra, at P. 629 that...."When the factual allegations in the pleadings of the party opposing summary judgment are supported by affidavits or other evidential material, they must be taken as true in ruling on the

motion."

Thus, Third Party Plaintiff's presentation of the indemnification clause and the surrounding circumstances, namely that there was no limitation in the coverage of the indemnification clause, should have been followed by the District Court in ruling on the motion for summary judgment and the motion for summary judgment should have been dismissed.

POINT II.

THE DISTRICT COURT'S RULING ON THE MOTION FOR SUMMARY JUDGMENT WAS INAPPROPRIATE UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Third Party Defendant moved under Rule 56 (c) of the Federal Rules of Civil Procedure for summary judgment against Third Party Plaintiff's action for indemnification under the escrow agreement signed by the parties to these proceedings. Rule 56 (c) states in part that a "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Summary judgment is thus a convenient and expeditious method to dispense with unnecessary litigation where there is no genuine dispute as to any material issue and when the

moving party is entitled to judgment as a matter of law. Mintz v. Mathers Fund, Inc. 463 F2 495 (1972) and Central Specialties Co. v. Schaefer 318 F. Supp. 855 (1970).

In a proceeding for summary judgment the burden of proof in showing that there is no genuine dispute as to any material issue and that as a matter of law, the motion should be granted, is on the moving party. Society of New York Hosp. v. Associated Hosp. Service of New York 367 F. Supp. 145 (1973), 6 Moore's Federal Practice[56.04 (2)]. Other Federal Courts have declared that this burden is, "much more strict than that on a trial on the merits" Kilfoyle v. Wright 300 F2 626, 629 (1962).

It is obvious from the various pleadings of the parties to this proceeding that there is a dispute over the meaning or coverage of the indemnification clause. It also should be noted that neither the Third Party Defendant in his moving papers, nor the District Court Judge in his Order granting summary judgment have come forth with any case or statutory law that would require judgment as a matter of law.

Summary judgment is also inappropriate where a contract is involved and where the meaning or interpretation of the contract is disputed. In the present proceeding, as was previously mentioned, both parties have come forth with a different meaning for the indemnification clause. In

Goldinger v. Gordon Oil Company 375 F. Supp. 400, 412(1974) it was stated that, "We recognize that where a case depends on the resolution of conflicting inferences of fact which may be drawn from undisputed terms of a writing, summary judgment is improper". Summary judgment is also "inappropriate where motive and intent are important or where credibility is a factor". Goldinger, supra, at P. 412. See also, Baxter v. Lancer Industries, Inc., 213 F. Supp. 92, Appeal Dis. 324 F2 286 (1963).

In discussing the problem of contract interpretation, where two conflicting views of the agreement are present, the U.S. Court of Appeals for the Second Circuit has stated that, "Since both are possible interpretations, we think there was a factual question as to the parties' intent which could not be resolved on a motion for summary judgment." Lemelson v. Ideal Toy Corp. 408 F2 860 (1969).

Finally, when a contract is susceptible to two possible interpretations, summary judgment is inappropriate. Aetna Casualty & Surety Co. v. Giesou 412 F2 468 (1969) USCA Second Circuit and OZLU v. Loch Haven Hosp. 60 F.R.D. 673 (1973).

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COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

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Donald Quinn

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Rudolph L. Moloughney
Commissioner of Deeds

cc: Carl F. Guy, Esq.

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A P P E N D I X

1. Notice of Appeal
2. Judgment Appealed from.
3. Summons & Complaint - Eugenia E. Carver v. Carl F. Gu
4. Answer and Counterclaim
5. Reply
6. Summons & Complaint in third party action
7. Third-Party Answer
8. Notice of Motion for Summary Judgment or to Dismiss Third-Party Complaint.
9. Answering Affidavit of Defendant and Third-Party Plaintiff.

CONCLUSION:

Appellant respectfully requests that the Order of the Federal District Court, granting summary judgment, be dismissed and that his Third Party Action against the Appellee be reinstated.

Respectfully submitted,

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